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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

v.

KATHLEEN DUBOSE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U.S. 111 (1979) TO THIS F.E.L.A. ACTION REPRESENTS AN UNWARRANTED AND UNJUSTIFIED REVISION OF *URIE V. THOMPSON*, 337 U.S. 163 (1949)?

II. WHETHER THE TRIAL COURT'S CHARGE WAS CLEARLY ERRONEOUS AND STRIPPED KANSAS CITY SOUTHERN OF THE OPPORTUNITY TO LITIGATE THE LIMITATIONS ISSUE?

LIST OF PARTIES

Kathleen Dubose

Kansas City Southern Railway Company

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To The Honorable Supreme Court Of The United States:

Kansas City Southern respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Dubose v. Kansas City Southern Railway Company*, C.A. 5 No. 82-2307 (April 16, 1984).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ____F.2d____ (1984) and is reproduced as Appendix A. The order of the Court of Appeals denying the petition

for rehearing and suggestion for rehearing en banc is reported at ___F.2d___ (1984) and is reproduced as Appendix B.

JURISDICTION

The judgment sought to be reviewed was entered on April 16, 1984. The petition for rehearing and suggestion for rehearing en banc were overruled on May 31, 1984.

This Court's jurisdiction is founded upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 45 U.S.C. § 56:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in the district court for the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

For the purpose of this petition, we accept the following description of the parties and the background facts contained in the opinion below:

> William Dubose worked for KCS as a railroad car repairman from approximately 1950 to 1977 when he retired. In the course of his work he was

exposed to various irritants or noxious agents, including sulfur, grain dust, petroleum coke dust, fiberglass and silica. Dubose began to develop breathing problems during the late 1960's. He was first admitted into the hospital in January 1977 for treatment of shortness of breath, and was diagnosed as having chronic obstructive pulmonary disease. Later in the month Dubose's doctors performed a right and left sympathectomy and removed a small portion of his right lung. He was then diagnosed as having tuberculosis. After his release from the hospital, Dubose began to receive treatment for the tuberculosis, spending some time at a tuberculosis clinic. He retired in July 1977 due to his health and breathing problems.

Dubose's health deteriorated during 1979, when he was hospitalized five times. During a December 1979 hospitalization, Dubose was diagnosed as having cancer of the lung. Carcinoma was discovered in the right upper lung, the site where earlier x-rays, beginning in January 1977, had revealed scarring. Dubose died on June 26, 1980. An autopsy confirmed the existence of diffuse pulmonary fibrosis, as well as a "poorly differentiated carcinoma—probably adenocarcinoma"—in the upper lobe of Dubose's lung.

Kathleen Dubose, widow of William Dubose, brought this F.E.L.A. action in September, 1980, alleging that KCS's negligence caused Dubose's tuberculosis, pulmonary fibrosis, and lung cancer. KCS heatedly denied any negligence and also contended that plaintiff's claim was barred by the F.E.L.A. statute of limitations, embodied in 45 U.S.C. § 56.

After a lengthy trial, the District Court charged the jury:

> The defendant contends that the plaintiff's claim is barred by the statute of limitations. The statute of limitations in a case such as this provides that an action for damages as the result of disease must be brought within three years from the date of the accumulated effects of the disease manifests itself (sic). Therefore if you find from a preponderance of the evidence that the effects of the plaintiff's husband's disease of cancer which caused his disease had manifest itself (sic) more than three years before plaintiff filed her lawsuit, September 27, 1980, then you would find for the defendant and against the plaintiff.

The jury then found for the plaintiff, awarding damages of $200,000.

KCS appealed, arguing primarily that (1) plaintiff's cause of action was barred by the three year statute of limitations as a matter of law, (2) the trial court's instruction on the statute of limitations was incorrect and highly prejudicial, and (3) there was no credible expert testimony to support the jury's finding of causation.

The Court of Appeals dispatched KCS's first argument by holding that the test for accrual of the cause of action was governed by *United States v. Kubrick*, 444 U.S. 111 (1979), a Federal Tort Claims Act case, and *not* by *Urie v. Thompson*, 337 U.S. 163 (1949), an F.E.L.A. case. The Court of Appeals acknowledged that KCS's second argument, concerning the palpable error in the jury charge, was correct but held that KCS invited the error and failed to object sufficiently. The Court of Appeals dismissed KCS's contention that there was no credible expert testimony in cursory fashion. KCS sought a rehearing and also sought a hearing en banc. The panel denied both motions.

REASONS FOR GRANTING THE WRIT

I.

APPLICATION OF *UNITED STATES V. KUBRICK*, TO THIS F.E.L.A. CASE REPRESENTS AN UNWARRANTED AND UNJUSTIFIED REVISION OF *URIE V. THOMPSON*.

The Supreme Court announced in *Urie v. Thompson*, 337 U.S. 163 (1949), a specific and simple test with which to determine when the F.E.L.A. statute of limitations begins to run: The afflicted individual's cause of action accrues when "the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170.

Urie has been applied in F.E.L.A. cases for more than thirty years without mishap or misadventure. The ease with which *Urie* has been applied is understandable. The trier of fact need only determine whether the accumulated effects of exposure to deleterious substances manifested themselves more than three years prior to the bringing of suit. *Urie* thus focuses upon a single question: When did the effects manifest themselves?

By its decision in this case, the Fifth Circuit revamps the *Urie* test. The Court of Appeals has decided, unlike the Court in *Urie*, to require not only knowledge or perception of manifestation but also the requirement that the plaintiff know or have reason to know of the *probable cause* or source of his injury. The addition of this requirement virtually destroys the statute of limitations defense in F.E.L.A. occupational disease cases.

The injustice of applying the *Kubrick* test, aside from the undeniable difficulty in casting *Urie* aside, is well

illustrated by the facts of this case. Assume that KCS could divine that the Fifth Circuit would eschew *Urie* and apply *Kubrick*. To prevail on a limitations defense, KCS would have to demonstrate not only manifestation, which even the panel concedes KCS did for pulmonary fibrosis and tuberculosis, but also that Dubose knew or should have known of the probable *cause* of the diseases. If KCS adduces evidence of that nature, it might prevail on limitations. If KCS did not prevail on limitations, however, the evidence would insure an adverse finding of liability as the same facts that support knowledge or reason to know of the cause also give rise to the conclusion that the railroad knew or should have known of the hazard and failed to furnish a safe place to work. This leads to an ironic but pernicious result. The more negligent a defendant, the more likely the defendant is to prevail on the limitations defense. The more innocent the defendant, like the KCS in this case, the more difficult it becomes to succeed on limitations. The central fallacy in applying the test suggested by the Fifth Circuit is that it incorporates negligence and causation into the statute of limitation defense when they so clearly do not belong. *Urie* controls and *Urie* should be applied.

II.

THE TRIAL COURT'S CHARGE, UNDER EITHER *URIE* OR *KUBRICK*, WAS CLEARLY ERRONEOUS AND STRIPPED KCS OF THE OPPORTUNITY TO LITIGATE THE LIMITATIONS ISSUE.

The trial court instructed the jury that:

> The defendant contends that the plaintiff's claim is barred by the statute of limitations. The statute of

> limitations in a case such as this provides that an action for damages as the result of disease must be brought within three years *from the date of the accumulated effects of the disease manifiests itself* (sic). Therefore if you find from a preponderance of the evidence that *the effects of the plaintiff's husband's disease of cancer which caused his disease had manifest itself* (sic) more than three years before plaintiff filed her lawsuit, September 27, 1980, then you would find for the defendant and against the plaintiff (emphasis added).

The charge is deficient in two respects. First, it preverts the test articulated by the *Urie* Court. Second, it restricted the jury's consideration of the limitations question to whether the effects of Dubose's lung cancer had manifiested themselves before June, 1977 when the issue was whether Dubose's pulmonary disease had manifiested itself before that time.

In *Urie*, the Supreme Court acknowledged that a cause of action under the F.E.L.A. for occupational disease accrues "when the accumulated effects of the deleterious substance manifest themselves." *Urie, supra,* at 170. The trial court omitted the phrase "of deleterious substance" and substituted in its stead the phrase "of the disease". Thus, the trial court charged the jury that the plaintiff's cause of action accrued when the accumulated effects of the disease manifested themselves. Seconds later the trial court charged the jury that the "disease" was lung cancer. The jury could not, given that instruction, have decided the limitations issue in defendant's favor. In fact, the jury could only conclude from the charge that the plaintiff's cause of action accrued from accumulated effects of Dubose's lung cancer manifested themselves. The Fifth Circuit agreed with KCS and held that the charge was

erroneous. The Court of Appeals concluded, however, that KCS led the trial court into error and that the objections of KCS to the charge were not specific. KCS contends in this Court that the Court of Appeals was incorrect in this holding and, further, that the court's charge was plain error.

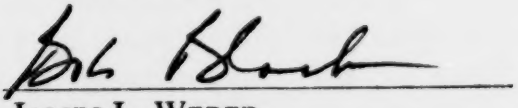
CONCLUSION

Urie has been applied in F.E.L.A. cases for thirty-five years. *Urie* requires only manifestation; it does not mandate knowledge of causation. *Urie* should be applied. KCS also contends that the trial court's instruction to the jury was clearly erroneous and removed the statute of limitations issue from the case.

WHEREFORE, PREMISES CONSIDERED, KCS prays that the writ of certiorari be granted.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN

By: 

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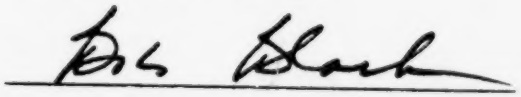
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instruments were duly served in the number and in the manner prescribed by the rules of this Court upon Robin Steele, attorney of record for Kathleen Dubose on this the 5th day of July, 1984.



APPENDIX A

Kathleen DUBOSE, Plaintiff-Appellee,

v.

KANSAS CITY SOUTHERN RAILWAY CO.,
Defendant-Appellant.

No. 82-2307.

United States Court of Appeals,
Fifth Circuit.

April 16, 1984.

In a wrongful death action brought under the Federal Employers' Liability Act, plaintiff obtained judgment in the United States District Court for the Eastern District of Texas at Beaumont, Joe J. Fisher, J., from which the defendant railroad appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) rule of *United States v. Kubrick* represents latest definition of discovery rule and where applicable on facts should be applied in federal cases, including those under Federal Employers' Liability Act; (2) when a plaintiff may be charged with awareness, for limitations purposes, that his injury is connected to some cause should depend on such factors as how many possible causes exist and whether medical advice suggests erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury; (3) on widow's testimony, railroad's request for jury instruction separating earlier pulmonary disease from lung cancer was inappropriate where, under evidence, cancer might have been more serious complication of the earlier

disease; and (4) trial court's modification of railroad's requested instruction was objectionable in directing jury to consider only disease of cancer, thereby effectively taking limitations issue out of the case, but there was no plain error.

Affirmed but, in part, reversed and remanded, for modification of damages.

Appeal from the United States District Court for the Eastern District of Texas.

Before REAVLEY, RANDALL and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Kansas City Southern Railway Company (KCS) appeals an adverse judgment in a wrongful death action brought under the Federal Employers' Liability Act (FELA) 45 U.S.C. § 51 et seq. (1976), complaining principally that the plaintiff's cause of action was time barred. We affirm, but remand for modification of damages.

I

William DuBose worked for KCS as a railroad car repairman from approximately 1950 to 1977, when he retired. In the course of his work he was exposed to various irritants or noxious agents, including sulphur, grain dust, petroleum coke dust, fiberglass and silica. DuBose began to develop breathing problems during the late 1960's. He was first admitted into the hospital in January 1977 for treatment of shortness of breath, and was diagnosed as having chronic obstructive pulmonary

disease. Later in the month DuBose's doctors performed a right and left sympathectomy and removed a small portion of his right lung. He was then diagnosed as having tuberculosis. After his release from the hospital, DuBose began to receive treatment for the tuberculosis, spending some time at a tuberculosis clinc. He retired in July 1977 due to his health and breathing problems.

DuBose's health deteriorated during 1979, when he was hospitalized five times. During a December 1979 hospitalization, DuBose was diagnosed as having cancer of the lung. The carcinoma was discovered in the right upper lung, the site where earlier X-rays, beginning in January 1977, had revealed scarring. DuBose died on June 26, 1980. An autopsy confirmed the existence of diffuse pulmonary fibrosis, as well as a "poorly differentiated carcinoma—probably adenocarcinoma"—in the upper lobe of DuBose's lung.

Kathleen DuBose, DuBose's widow, filed this suit in September 1980, alleging that KCS's negligence caused DuBose to suffer injuries that resulted in his death. At trial, appellee's medical expert testified that the cancer could have been caused in either of two ways. First, pulmonary fibrosis, produced by the exposure to irritants, could have developed into scar carcinoma. Second, the cancer could have developed from the periphery of a tuberculosis scar.[1] KCS's medical expert opined that the cancer developed from a longstanding scar caused by tuberculosis.

The jury found for appellee on the issues of negligence and causation, returning a verdict against KCS for $200,-

1. Appellee's contention, supported by medical evidence, was that work conditions reduced DuBose's capacity to resist the tuberculosis bacteria.

000. On appeal KCS argues primarily the limitations question and its submission to the jury.

II

[1] Section 6 of the FELA provides in part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56 (1976). The thrust of KCS's argument on appeal is that DuBose's cause of action accrued early enough to bar appellee's recovery. Since the statute does not define when a cause of action accrues, we look to case law for the answer.

[2] Ordinarily, a statute of limitations begins to run at the moment a plaintiff's legally protected interest is invaded. This injury usually coincides with the tortious act. *See, e.g.*, Restatement (Second) of Torts § 899 comments c & e (1977). Often, however, plaintiffs may be unaware that they have been injured, even though the tort has been completed. Courts thus developed the "discovery rule" to mitigate the harshness of applying statutes of limitations strictly in cases involving medical malpractice, occupational diseases, and other types of latent injuries.

The Supreme Court created and supplied the rationale for the federal discovery rule in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), a case brought under the FELA by a steam locomotive fireman suffering from silicosis. Application of the traditional accrual rule would have barred any recovery, affording "Urie only a delusive remedy" by charging him "with knowledge of the slow and tragic disintegration of his lungs" "at some past moment in time, unknown and in-

herently unknowable. . ." *Id.* at 169, 69 S.Ct. at 1024. Since there was "no suggestion that Urie should have known he had silicosis at any earlier date," the Court held that his cause of action accrued " 'only when the accumulated effects of the deleterious substance manifest[ed] themselves.' " *Id.* at 170, 69 S.Ct. at 1025 (quoting *Associated Indemnity Corp. v. Industrial Accident Commission,* 124 Cal.App. 378, 381, 12 P.2d 1075, 1076 (1932).

We extended the *Urie* discovery rule to medical malpractice actions under the Federal Tort Claims Act (FTCA) in *United States v. Reid,* 251 F.2d 691 (5th Cir. 1958) (*Urie* approach employed to determine accrual date of plaintiff's claim of negligent advice and treatment), and in *Quinton v. United States,* 304 F.2d 234, 235 (5th Cir. 1962) (federal medical malpractice action accrues when "claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based"). Other federal circuit courts later applied the *Urie* approach to FTCA medical malpractice claims. *See United States v. Kubrick,* 444 U.S. 111, 120 n. 7, 100 S.Ct. 352, 358 n. 7, 62 L.Ed.2d 259 (1979); *Waits v. United States,* 611 F.2d 550, 552 n. 2 (5th Cir. 1980). Courts understood the general rule in medical malpractice cases to be that the limitations period did not run until a plaintiff discovered both his injury and its cause. *Id.* 444 U.S. at 120, 100 S.Ct. at 358. In the five years prior to *Kubrick*, however, a few courts expanded the discovery rule to require that a plaintiff "know the legal implications of the facts, as well as the facts themselves, before the limitations period . . . begin[s] to run." *Id.* at 121 n. 8, 100 S.Ct. at 359 n. 8. *See Stoleson v. United*

States, 629 F.2d 1265, 1268 n. 3 (7th Cir. 1980) (circuit courts recently had expanded rule to prevent claim's accrual until patient had reasonable opportunity to discover each element of his cause of action—duty, breach, causation, and damages).

In *Kubrick,* the Court disapproved of and cut back on the expanded discovery rule. "We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment." 444 U.S. at 122, 100 S.Ct. at 359. The Court reiterated the *Urie* rationale behind the discovery rule and approved its application to cases where the fact of injury may be unknown or unknowable and where the facts of "causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* Once a plaintiff possesses critical facts, however, legal and medical professionals are available to give advice to an injured person concerning whether he has been legally wronged. *Id.* While upholding the discovery rule as it had generally developed, the Court refused to extend the rule so as to defeat the limitations statute's "obvious purpose, which is to encourage the prompt presentation of claims." *Id.* at 117, 100 S.Ct. at 357. *See id.* at 125, 100 S.Ct. at 360-61.

III

[3] KCS contends that *Kubrick* should not be applied to this case. KCS argues that the *Kubrick* test—no accrual until plaintiff knows the facts of injury and causation—is limited to medical malpractice cases under the FTCA, and that the *Urie* test—no accrual until injurious effects manifest themselves—applies to occupational dis-

ease cases under the FELA. We disagree and hold that *Kubrick* is not limited to the FTCA or to medical malpractice cases. *See Stoleson v. United States,* 629 F.2d 1265, 1268 (7th Cir. 1980). The *Kubrick* rule, we think, represents the Court's latest definition of the discovery rule and should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause. We do not view *Urie* and *Kubrick* as expressions of two distinct tests. Instead, the two cases represent a continuum. *Urie* signalled the inception of the discovery rule and *Kubrick* merely restated the rule while defining its outer limits. Both cases, however, reflect the same rationale.

Our cases have foreshadowed this statement of the law. *United States v. Reid,* 251 F.2d 691 (5th Cir. 1958), involved a claim under the FTCA. Reid, who was experiencing chest pains, requested that X-rays be taken. Although the X-rays showed that Reid was actually suffering from incipient tuberculosis, his doctor negligently told him that nothing was wrong. The court saw no reason to avoid application of *Urie,* which concerned limitations under the FELA. "To think that two diseases [tuberculosis and silicosis], each operating immediately on the lungs, generaly as the result of slow and imperceptible actions, are so different as to require distinct rules of law would only add confusion to what now unavoidably borders on metaphysical dialectic." *Id.* at 694. *See Lavellee v. Listi,* 611 F.2d 1129, 1131 n. 4 (5th Cir. 1980) (medical malpractice claim under 42 U.S.C. § 1983) (assuming that federal standard for accrual of claims does not vary among FTCA, FELA and § 1983; "prior cases under one federal act have relied on cases under

other federal acts concerning accrual of causes of actions").

We have also applied a discovery rule in pre-*Kubrick* cases that in essence is no different from the test enunciated in *Kubrick*. In *Aerojet-General Shipyards, Inc. v. O'Keefe*, 413 F.2d 793 (5th Cir. 1969), we applied the equivalent of *Kubrick* to a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. We held that the injured employee's claim did not accrue until he learned that he suffered from rheumatoid arthritis and chronic pulmonary fibrosis, caused or aggravated by his exposure to sandblasting during his employment. "The limitations period for occupational diseases begins to run when the employee knows, or reasonably should know, that his condition is a disease which arose out of his employment." *Id.* at 795 (citing *Traveler's Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955)). We also think that the *Kubrick* test was encompassed in the accrual standard set out in *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962), which relied heavily on *Urie*. We stated that "a claim for malpractice accrues against the Government when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." *Id.* at 240. The word "acts," as used by the *Quinton* court, implies the fact of injury as well as the connection between that injury and its cause.

Moreover, we have characterized *Urie's* holding in a manner that also describes the test stated in *Kubrick*. In *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983), an FELA case, the court

noted that limitations does not run against a claimant, who "has no reason to know of his injury when it is sustained," until he "becomes aware that he has been injured and that his injury is work related." *Id.* at 1119 (citing *Urie*).

[4] While we acknowledge that the *Kubrick* court did not discuss whether a claim accrued when a plaintiff should reasonably have been aware of the critical facts of injury and causation, we think that the *Kubrick* test implicitly contains this formulation. *See, e.g., Davis v. United States,* 642 F.2d 328, 330 (9th Cir. 1981), *cert. denied,* 455 U.S. 919, 102 S.Ct. 1273, 71 L.Ed.2d 459 (1982); *Barrett v. Hoffman,* 521 F. Supp. 307, 317 & n. 14 (S.D. N.Y. 1981), *rev'd on other grounds,* 689 F.2d 324 (2d Cir. 1982). Under the facts of *Kubrick,* the plaintiff had actual knowledge of his injury and its causation. What was at issue was whether limitations would run while Kubrick awaited actual knowledge that his injury was *negligently* inflicted. The discovery rule developed to avoid mechanical application of statutes of limitations. Thus, we do not read *Kubrick* as setting an inflexible rule. Instead, we think that the Court intended the discovery rule to be applied in differing fact situations to effectuate the rationale behind the rule. In most cases a plaintiff will have actual knowledge of his injury no later than the time when he should have known he was injured. The discrepancy may be greater, however, between actual knowledge and constructive knowledge of the fact of causation. When a plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection

or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury. *See Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983) (plaintiff's medical records concealed or lost for several years; physicians' advice negated the causal connection); *Aerojet-General Shipyards, Inc. v. O'Keefe*, 413 F.2d 793 (5th Cir. 1969) (several physicians expressly rejected claimant's suspicion that his breathing difficulties were caused by or related to working condition); *see also Augustine v. United States*, 704 F.2d 1074, 1078 (9th Cir. 1983) (*Kubrick* "cannot be applied mechanically to [medical malpractice] cases involving the failure to diagnose, treat, or warn"); *Young v. Clinchfield Railroad Co.*, 288 F.2d 499, 502-04 (4th Cir. 1961) (silicosis action under FELA).

IV

The accrual of DuBose's cause of action was an issue at trial. KCS proceeded on the assumption that *Urie*, and not *Kubrick*, governed the accrual date. DuBose's illness led to his hospitalization and the diagnosis of tuberculosis in early 1977, more than three years prior to the filing of this suit. KCS therefore contended that, under the *Urie* test, DuBose's entire cause of action was time-barred. *See O'Keeffe*, 413 F.2d at 795 n. 3.

[5] Appellee DuBose contended that *Kubrick* applied and that the cause of action did not accrue until December 1979, the first time cancer was diagnosed. Kathleen DuBose testified that her husband first related his disease to his occupation at the time of the cancer diagnosis. She stated that DuBose thought that his earlier pulmonary problems were connected in some way to his wartime injuries.

KCS requested a jury instruction that separated the earlier pulmonary disease from the lung cancer. This was inappropriate where, under the evidence, the cancer may have been a more serious complication of the earlier disease. It was necessary for appellee to trace the cause of DuBose's lung cancer through the earlier pulmonary problems to the conditions that existed at DuBose's work place. KCS requested the following jury instruction:

> [# 7] You are instructed that, under the evidence in the case, it is undisputed that Mr. DuBose had been suffering from pulmonary problems for many years. This pulmonary disease had manifested itself for a period in excess of three years prior to the plaintiff's filing suit on September 24, 1980. Suit for this prior disease is therefore barred by the statute of limitations and you should award no damages to the plaintiff relating thereto. On the other hand, the plaintiff claims that Mr. DuBose was diagnosed as having lung cancer in 1979. If you find for the plaintiff on negligence and if you find that the disease of lung cancer did not manifest itself until some period within the three year statute of limitations then you may award damages but only such damages as you may find are attributable to the lung cancer and not to the pre-existing problems.

The district judge was clearly correct in refusing to instruct the jury that recovery for DuBose's pre-cancer pulmonary problems was barred as a matter of law. This instruction looked solely to manifestation of the diseases and told the jury to treat them separately. If a *Kubrick*-type test were made the basis for the inquiry, there was a fact question regarding when DuBose became aware that his disease was causally related to his employment.

See Emmons, 701 F.2d 1112 (5th Cir. 1983); *O'Keeffe*, 413 F.2d 793 (5th Cir. 1969). KCS's Requested Jury Instruction No. 7 was properly denied.

[6] At first look we were concerned by the district court's modification of KCS's Requested Jury Instruction No. 10.[2] The instruction given directed the jury to consider only the disease of cancer. This instruction effectively took the limitations issue out of the case, since KCS did not claim that DuBose was or should have been aware of the critical facts of his lung cancer before late 1979, a time clearly within the limitations period. KCS, however, failed timely to object to the court's language that focused the jury's inquiry on the disease *of cancer*. The district court charged the jury:

> [T]he defendant contends that the plaintiff's claim is barred by the statute of limitations. The statute of limitations in a case such as this provides that an action for damages as a result of disease must be brought within three years from the date of the accumulated effects of the disease manifest itself [sic]. Therefore if you find from a preponderance of the evidence that the effects of the plaintiff's husband's *disease of cancer* which caused his death had manifest itself [sic] more than three years before plaintiff filed her lawsuit, September the 27th, 1980, then you would find for the defendant and against the plaintiff. If you do not so find, of course, you would not find against the plaintiff on the question of limitations. (emphasis added).

After the jury began its deliberations the district court heard the objections of counsel. Counsel for KCS stated:

---

2. "If you find that Mr. DuBose's disease manifested itself more than three years prior to September 24, 1980, then you will find for the defendant."

"To the extent that the court did not include in its instructions to the jury those requested charges of the defendant which have been filed numbered one through ten, we would object to the charge for that reason." After voicing this general objection, KCS then made more specific objections. First, the charge failed to separate the pre-cancer disease from the cancer. Second, the charge failed to instruct that recovery was barred for the pre-cancer disease. These objections relate to the district court's denial of KCS's Requested Jury Instruction No. 7. Third the court should have instructed the jury that a cause accrues when *symptoms* are manifested, not necessarily when a disease is diagnosed. This objection reflects the court's modification of KCS's Requested Jury Instruction No. 6.[3] KCS, however, failed to draw the court's attention to the limitations charge's focus on cancer. *See* Fed. R. Civ. P. 51; *Industrial Development Board v. Fuqua Industries, Inc.*, 523 F.2d 1226, 1237-38 (5th Cir. 1975); *Klapmeier v. Telecheck International, Inc.*, 482 F.2d 247, 255 (8th Cir. 1973). KCS simply did not object to any failure to give the jury the fact question of when DuBose's entire cause of action accrued.

Except in unusual cases, "failure to object ordinarily bars later challenge to an instruction." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558 at 671 (1971). *See id.* § 2553 at 639-42. We find that the infirmity in the jury instruction on limitations does not rise to the level of plain error. *See id.* § 2558 at 671-72.

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3. "You are instructed that the statute of limitations begins to run and the three year time period for filing suit is commenced when the symptoms of the disease manifest themselves, not necessarily when a diagnosis is made."

We also note that KCS may have invited the error by separating DuBose's pre-cancer lung disease from the lung cancer and by requesting a jury finding only on the latter. KCS consistently maintained that recovery for any fibrosis or tuberculosis was barred as a matter of law. KCS, however, failed to recognize and correct the error into which it led the court.[4]

V

[7] KCS contends that appellee presented no evidence to show that KCS was negligent and that DuBose's exposure to hazardous substances could cause cancer. Therefore, KCS argues, the district court erred by submitting the issues of negligence and causation to the jury. The record, however, is replete with testimony that DuBose was exposed to a variety of irritants. Appellee's expert, Dr. Joe De Leon, testified that DuBose's exposure to these irritants produced scarring in his lung and chronic bronchitis and reduced his ability to withstand tuberculosis infection. Dr. DeLeon also traced DuBose's cancer to the fibrosis or tuberculosis, which in turn he causally attributed to DuBose's working environment. Moreover, the record contains evidence of KCS's negligence. Reasonable minds could clearly differ on the critical issues of causation and negligence, which the trial court properly submitted to the jury.

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4. A party who requests an instruction has invited any error in it and cannot complain if the instruction, or one substantially like it, is given. But if the party recognizes the error into which he has led the court, and seeks to rectify it by objection when the instruction is given, he may have appellate review of the correctness of the instruction.
9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558 at 675-76.

There are two matters that require modification of the damages award. Appellee and KCS stipulated that KCS was entitled to a credit for 80% of funds expended by KCS's insurance carrier for DuBose's reasonable and necessary medical expenses. At oral argument appellee agreed that she was bound by the stipulation.

[8] Also, the jury was erroneously instructed that it could consider "the reasonable amount of expenses for funeral and burial for the deceased. . . ." Funeral expenses, however, may not be included in damages awarded in FELA actions. *See Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 526 & n. 4 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 815 (1980); *Cities Service Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968).

The cause is remanded to the district court for modification of the damages.

Affirmed but, in part, reversed and remanded.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2307

KATHLEEN DUBOSE,
Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion April 16, 1984, 5 Cir., 198__, __F.2d__)

(May 31, 1984)

(Received June 5, 1984)

Before REAVLEY, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ NORMAN M. REAVLEY
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, LA 70130

June 18, 1984

(Received June 20, 1984)

Mr. Robert A. Black
Attorney at Law
1400 San Jacinto Bldg.
Beaumont, Texas 77701

No. 82-2307

DUBOSE
v.
KANSAS CITY SOUTHERN RAILWAY CO.

MANDATE STAYED TO AND INCLUDING
July 10, 1984

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: /s/ ROSALIE VARINO/lb
Deputy Clerk

Enclosures

cc: Mr. Joseph R. Steele

B-5

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, LA 70130

June 8, 1984

(Received June 11, 1984)

Mr. Robert A. Black
Attorney at Law
1400 San Jacinto Bldg.
Beaumont, Texas 77701

No. 82-2307

DUBOSE
v.
KANSAS CITY SOUTHERN RAILWAY CO.

In regards to the case identified above, the following motion has been filed:

MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

This motion will be presented for ruling *without oral argument* on this date: June 15, 1984.

Any response to the motion must be filed by opposing counsel on or before that date to be considered in the ruling.

Please forward a certificate of interested persons as required by Local Rule 27.5 within the foregoing time period.

The date shown above indicates when the matter will be forwarded for ruling and does not mean that any action will be completed by then. Counsel should allow at least ten (10) days thereafter before inquiring about the Court's ruling.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: /s/ ROSALIE VARINO/lb
Deputy Clerk

cc: Mr. Joseph R. Steele

84-792

Office - Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

vs.

KATHLEEN DUBOSE,
Respondent

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PROVOST, UMPHREY,
McPHERSON & SWEARINGEN
4000 Twin City Highway
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Port Arthur, TX 77643
Attorneys for Respondent

WALTER UMPHREY
Of Counsel

BEST AVAILABLE COPY

12 pp

QUESTIONS PRESENTED

I. WAS THE APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U.S. 111 (1979), TO THIS CASE PROPER?

II. WAS THE TRIAL COURT'S CHARGE CLEARLY ERRONEOUS?

LIST OF PARTIES

Kathleen DuBose
Kansas City Southern Railway Company

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

vs.

KATHLEEN DUBOSE,
Respondent

RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 729 F. 2d 1026 (5th Cir., 1984).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I. WAS THE APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U.S. 111 (1979), TO THIS CASE PROPER?

II. WAS THE TRIAL COURT'S CHARGE CLEARLY ERRONEOUS?

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the petition.

I.

WAS THE APPLICATION OF *UNITED STATES V. KUBRICK*, 444 U. S. 111 (1979), TO THIS CASE PROPER?

The federal discovery rule, governing the accrual of a cause of action was created by the United States Supreme Court in *Urie u Thompson*, 337 U. S. 163 (1949), in response to the unduly harsh results that would occur if the traditional accrual rule were applied. The Supreme Court in *Urie* stated that a humane legislative plan, in particular, 45 U.S.C. §56, the Federal Employers' Liability Act, (FELA), would not intentionally penalize blameless ignorance. Thus, under the facts there presented, the Court held that the cause of action accrued "only when the accumulated effects of the deleterious substance manifest themselves." *Urie* at 170.

Mr. Urie evidently had no problems in determining the cause of his pulmonary disease, silicosis. Frequently, however, victims of a latent disease which has become manifest are at a loss for a period of time to know what caused it. This situation was not before the *Urie* court, and therefore not discussed.

United States v. Kubrick, 444 U. S. 111 (1979), held that a cause of action will not accrue until a plaintiff has knowledge of both his injury *and* its cause. The Petitioner speculates that the *Kubrick* standard will destroy the defense of limitations in FELA occupational disease cases. This claim is spurious. There is no evidence that *Kubrick* has usurped the statue of limitations defense in Federal Tort Claims Act (FTCA) cases, involving medical malpractice.

The Petitioner claims that *Kubrick* is a radical departure from *Urie*, noted in the opinion below. This is just not the case. *Urie* was the first case to establish the discovery rule, but the rule has continually evolved through the years. The *Urie* discovery rule was extended to medical malpractice actions under the FTCA in *U. S. v Reid*, 251 F. 2d 691 (5th Cir. 1958). *See also Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962); *Waits v. United States*, 611 F. 2d 550 (5th Cir. 1980), and *United States v. Kubrick*, 444 U. S. 111 (1979).

In *Emmons v. Southern Pacific Transportation Co.*, 701 F. 2d 1112 (5th Cir. 1983), an FELA case, the Court stated that a cause of action will not accrue against a plaintiff who has no reason to know of his injury at the time it is sustained until he "becomes aware that he has been injured and that his injury is work related." *Id.* at 1119 (citing *Urie*). It is evident that *Kubrick* is not a different standard than *Urie*, but rather represents a refinement of the rule announced in *Urie*. Both cases reflect the same rationale, and the fifth circuit's application of *Kubrick* to this case was proper.

The Petitioner argues that applying *Kubrick* intertwines negligence into the statute of limitations defense. The sole focus of the *Kubrick* test is to determine at what point was the plaintiff aware of both the fact of his injury and its cause. *Id.* at 122. Whatever facts the defendant may have been aware of are irrelevant to the issue of what the plaintiff knew. As such the Petitioner is seeking to interject confusion where none exists.

II.

WAS THE TRIAL COURT'S CHARGE CLEARLY ERRONEOUS?

Rule 51 of the Federal Rules of Civil Procedure states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

It has been the rule that, in the absence of a proper and specific objection, a party cannot ordinarily claim error in the giving of an erroneous instruction. See C. Wright and A. Miller, Federal Practice and Procedure, §2553 at 639, (1976). The failure to timely and specifically object will bar a later challenge to an instruction. On rare occasions, an appellate court may reverse for plain error where necessary to prevent a miscarriage of justice. *Id.* §2558 at 671-672. Additionally, this exception has been confined to the exceptional case where the plain error has seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Liner v. J. B. Talley & Co., Inc.,* 618 F. 2d 327 (5th Cir. 1980).

The Petitioner invited any error there may have been by separating DuBose's pre-cancer lung disease from the lung cancer and by requesting a jury finding only on the latter as held by the court below. Its position throughout the trial was that damages due to the pre-cancer disease was barred as a matter of law. The fifth circuit was correct in holding that the error, if it was error, was invited and the Petitioner's failure to object properly and direct the trial court's attention to the limitation charges focus on cancer, constituted a waiver.

Finally, the fifth circuit was correct in finding that the error in the jury charge, if any, was not plain error. The Petitioner presented no testimony at the trial that Mr. DuBose knew or should have known that his pre-cancer problems were associated with his employment. The only evidence concerning the limitations issue came from Kathleen DuBose, who testified that her husband first related his disease to his occupation at the time of the diagnosis of cancer in December, 1979. She testified that he related his previous pulmonary difficulties to old war injuries. It is impossible to claim that the error, if any, resulted in any unfairness or injury to the public reputation of the judiciary. As such, the fifth circuit was correct in holding that the error, if any, did not amount to plain error.

CONCLUSION

Kubrick was the Supreme Court's latest pronouncement on the discovery rule in federal cases. It is not a separate and distinct test from *Urie*, but rather represents a continuum in the evolving test. *Kubrick* was properly applied. Finally, Petitioner invited error, if there was any, in the charge, and such did not amount to plain error.

Petitioner's undue prolongation of this matter should be terminated now.

WHEREFORE, Premises Considered, Respondent prays that the Writ of Certiorari be denied.

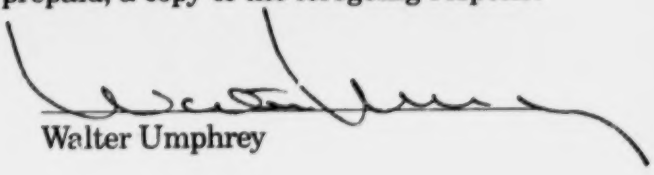
Respectfully submitted,

PROVOST, UMPHREY,
McPHERSON & SWEARINGEN
4000 Twin City Highway
P. O. Box 3837
Port Arthur, Texas 77643
Telephone (409) 963-0101

By: _____
Walter Umphrey, of Counsel
Texas Bar Association #20380000

CERTIFICATE OF SERVICE

I hereby certify that I have this 8 day of August, 1984, mailed, postage prepaid, a copy of the foregoing response to adverse counsel.



Walter Umphrey